STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
RONALD E. SESSLER,	)	
	)	
Complainant,	)	
	)	**Charge No.: 1998SF0588**
and	)	**EEOC No.: 21B981537**
	)	**ALS No.: 10737**
CF MOTOR FREIGHT,	)	
	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

On February 5, 1999, the Illinois Department of Human Rights filed a complaint on behalf of Complainant, Ronald E. Sessler. That complaint alleged that Respondent, CF Motor Freight, failed to take action and allowed a co-worker to sexually harass Complainant. The complaint further alleged that Respondent retaliated against Complainant when he reported that sexual harassment.

This matter now comes on to be heard on Respondent's Motion to Dismiss. Complainant has filed a written response to the motion, and Respondent has filed a written reply to that response. Respondent also filed motions to strike Complainant's response and to submit supplemental authority in support of its position. Complainant did not submit written responses to either of those motions.

FINDINGS OF FACT

The following findings are based upon the record file in this matter. For purposes of Respondent's motion to dismiss, all well-pleaded facts were taken as true.

1. Respondent, CF Motor Freight, hired Complainant, Ronald E. Sessler, on March 10, 1984. Complainant was hired as a dockman.

2. On or about September 30 and December 18, 1997, Robert Wenskunas, a co-worker of Complainant's, made certain remarks in Complainant's presence. Wenskunas directly asked Complainant, "Did you notice how your wife's nipples got hard when she saw me?" In Complainant's presence, Wenskunas said to another co-worker, "Do you know how to get hold of [Complainant's] wife? Dial 1-800-FUCK."

3. Complainant informed his supervisor about Wenskunas's statements.

4. Complainant was issued a written reprimand for causing a delay at work. That written reprimand did not affect Complainant's pay, seniority, or benefits.

6. On May 28, 1998, Respondent discharged Complainant for recklessness on the job which resulted in a serious forklift accident and extensive damage to company equipment. Such an accident is a "cardinal" offense under the collective bargaining agreement, justifying immediate discharge.

7. There is no evidence that Complainant's written

reprimand played any role in his subsequent discharge. That discharge is not challenged in the instant case.

CONCLUSIONS OF LAW

1. Complainant is an "aggrieved party" as defined by section 1-103(B) of the Illinois Human Rights Act, 775 ILCS 5/1-101 *et seq.* (hereinafter "the Act").

2. Respondent is an "employer" as defined by section 2-101(a) of the Act and is subject to the provisions of the Act.

3. Respondent's Motion to Strike Complainant's Response to Motion to Dismiss is denied.

4. Respondent's Motion for Leave to File Additional Supplemental Authority in Support of Motion to Dismiss is granted.

5. The statements made to and in the presence of Complainant were insufficient to create a hostile working environment.

6. The issuance of a written reprimand was not sufficiently severe to qualify as an adverse employment action.

7. The complaint does not state a claim on which relief can be granted with regard to sexual harassment.

8. The complaint does not state a claim on which relief can be granted with regard to retaliation.

9. The complaint in this matter should be dismissed

with prejudice.

DISCUSSION

Respondent, CF Motor Freight, hired Complainant, Ronald E. Sessler, on March 10, 1984. Complainant's was hired as a dockman. On or about September 30 and December 18, 1997, Robert Wenskunas, a co-worker of Complainant's, made certain remarks in Complainant's presence. Wenskunas directly asked Complainant, "Did you notice how your wife's nipples got hard when she saw me?" In Complainant's presence, Wenskunas said to another co-worker, "Do you know how to get hold of [Complainant's] wife? Dial 1-800-FUCK."

Complainant informed his supervisor about Wenskunas's statements. Apparently as a result of his complaint to management, Complainant was issued a written reprimand for causing a delay at work.

Subsequently, Complainant filed a charge of discrimination against Respondent. That charge alleged that Complainant had been sexually harassed and that Respondent had retaliated against Complainant when he reported that harassment.

Before moving to the merits of Respondent's motion to dismiss, there are two other motions which require rulings. The first such motion is Respondent's Motion to Strike Complainant's Response to Motion to Dismiss. Respondent filed that motion because Complainant's response to the

motion to dismiss was filed five days after the due date for the response. There was also an allegation that the postmark on the response did not match the date in the certificate of service. In this situation, the late filing did not have any negative effect on the motion and did not delay the ruling. The postmark problem may have been nothing more than a mistake, and there is no good purpose to be served by pursuing the matter at this point. Accordingly, Respondent's motion to strike Complainant's response is denied.

The next matter to consider is Respondent's Motion for Leave to File Additional Supplemental Authority in Support of Motion to Dismiss. Complainant has not filed a response to that motion, and the motion appears well grounded. Thus, the motion for leave to file supplemental authority is granted. With those procedural matters out of the way, the motion to dismiss can be addressed on its merits.

According to section 5/2-101(E) of the Act, sexual harassment is defined in relevant part as "any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when ... such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." With regard to Count I of the complaint, the sexual harassment claim, Respondent

argues that the statements made by Wenskunas do not constitute "conduct of a sexual nature," as that term is used in the Act. Respondent further argues that, as a matter of law, the comments were insufficient to create a hostile working environment.

The complaint in this matter alleges that Wenskunas made inappropriate and offensive comments about Complainant's wife. The Commission considered a similar set of allegations in ***Ford and Caterpillar, Inc.***, ___ Ill. HRC Rep. ___, (1993SF0242, October 28, 1996). In ***Ford***, as in the instant case, the complainant alleged that a co-worker made several comments about his wife. Those comments included questions about the complainant's wife's appearance, a reference to the complainant's wife as his daughter, and an offer to help the complainant with the "exercise part" of his sex life. The Commission found that such remarks were not "conduct of a sexual nature" even though they made reference to sexual matters. The Commission noted that the sort of sexual teasing involved in ***Ford*** can be hurtful but is not the type of discrimination prohibited by the Human Rights Act.

The rationale of ***Ford*** is controlling in the instant case. The remarks made by Wenskunas were inappropriate in a work setting, but they are not actionable under the Act.

Even if Wenskunas's statements qualified as sexual

conduct, they were too infrequent to create a hostile working environment. The existence of a hostile environment is measured against an objective standard. ***Kauling-Schoen and Silhouette American Health Spas***, ___ Ill. HRC Rep. ___, (1986SF0177, February 8, 1993). Isolated incidents generally do not generate a hostile environment unless they are quite severe, and unwelcome conduct which is not more than a few isolated instances will not create liability. ***Klein and Jack Schmitt Ford, Ltd.***, ___ Ill. HRC Rep. ___, (1990SF0162, January 17, 1997).

There were only two statements alleged in the complaint, and those statements were made nearly three months apart. They clearly qualify as isolated instances and therefore do not create liability. Thus, Count I of the complaint does not state a claim upon which relief can be granted. That count therefore should be dismissed.

Complainant fares no better with regard to Count II. That count alleges that Respondent retaliated against Complainant when it issued him a written reprimand.

To establish a *prima facie* case of retaliation, Complainant must prove three elements. He must prove 1) that he engaged in a protected activity, 2) that Respondent took an adverse action against him, and 3) that there was a causal nexus between the protected activity and Respondent's action. ***Carter Coal Co. v. Human Rights Commission***, 261

Ill. App. 3d 1, 633 N.E.2d 202 (5th Dist. 1994). Respondent argues that Complainant did not engage in protected activity and that the company did not take an adverse action against him.

Respondent first argues that, because Wenskunas's comments did not qualify as sexual conduct, Complainant was not engaging in protected activity when he complained about those comments to the company's management. To reach that conclusion, Respondent had to gloss over part of the language of the retaliation section of the Act. Section 6-101(A) of the Act bars retaliation against a person who "has opposed that which he or she *reasonably and in good faith believes* to be ... sexual harassment" (emphasis added). Thus, under the plain terms of the Act, to prevail on his retaliation claim, Complainant does not need to show that he was in fact a victim of sexual harassment. Instead, he needs to show only that he had a reasonable, good faith belief that he was such a victim. For purposes of the instant motion, the allegations of Count II of the complaint meet that standard.

Unfortunately for Complainant, Respondent's second argument is enough to justify granting the company's motion. Respondent argues that it did not take an adverse action against Complainant.

There is no question that Complainant informed his

supervisor about Wenskunas's statements. There also is no dispute that Complainant was issued a written reprimand for causing a delay at work. According to Respondent's own statements, the "delay" involved was the time the company took to investigate Complainant's allegations. Thus, there was a clear connection between Complainant's complaint and Respondent's actions. Therefore, if the written reprimand qualifies as an adverse action, Complainant clearly states a cause of action. Fortunately for Respondent, the written warning does not constitute an adverse action under controlling case law.

An adverse action must be sufficiently pervasive or severe to constitute a term or condition of employment. If it fails to meet that standard, it cannot give rise to a cause of action under the Act. ***Campion and Blue Cross and Blue Shield Ass'n***, ___ Ill. HRC Rep. ___, (1988CF0062, June 27, 1997). The written reprimand Complainant received did not affect his pay, seniority, or benefits, and it was not a factor in his later discharge. Under ***Campion***, that single reprimand does not give rise to a cause of action.

Further support for Respondent's position can be found in ***Gallego and Roadway Express, Inc.***, ___ Ill. HRC Rep. ___, (1997CF0515, November 2, 1999). In ***Gallego***, the complainant received <u>two</u> written reprimands which were placed in his personnel file. Despite those reprimands, the Commission

affirmed a summary decision in favor of the respondent on the complainant's retaliation claim. Like the reprimands in the instant case, the ones in ***Gallego*** did not affect pay or seniority and, pursuant to a collective bargaining agreement, they were to be removed from the complainant's file after a specified period of time. In addition, as in the instant case, they were not used to enhance any subsequent discipline. According to the Commission, the reprimands did not qualify as adverse actions because they did not result in materially adverse consequences to the employee who received them.

Under the rationale of ***Campion*** and ***Gallego***, Complainant's written reprimand was not sufficiently severe to constitute a material term or condition of employment. Therefore, it cannot be considered an adverse action. As a result, Count II of the complaint should be dismissed.

It should be noted that there is no way the allegations in the complaint can be redrawn in a way that will state a cause of action. The facts of the case simply are not actionable. Thus, the entire complaint should be dismissed at this point with prejudice.

RECOMMENDATION

Based upon the foregoing, even assuming all its factual allegations to be true, the complaint in this matter does not state a claim upon which relief can be granted.

Accordingly, it is recommended that the complaint in this matter be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____
MICHAEL J. EVANS
ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: April 19, 2001